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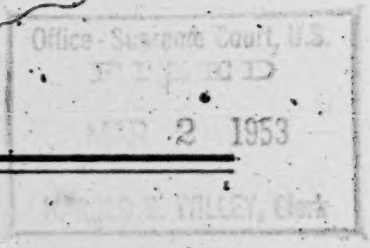

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 330.

ESSO STANDARD OIL COMPANY,
Appellant,

vs.

JAMES CLARENCE EVANS, Commissioner, etc.,
Appellee.

On Appeal from the Supreme Court of the State of Tennessee.

BRIEF FOR THE APPELLEE, JAMES CLARENCE EVANS, ETC.

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REFERENCE TO OPINIONS BELOW AND GROUNDS OF JURISDICTION.

Appellee adopts the "Reference to Opinions Below" and "Grounds of Jurisdiction" as stated in appellant's brief (Brief on behalf of appellant Esso Standard Oil Company, pp. 1-2).

STATEMENT OF THE CASE.

Appellee adopts the "Statement of the Case" as stated in appellant's brief (Brief on behalf of appellant Esso Standard Oil Company, pp. 2-3), excepting that statement that no assertion of tax liability was made by Tennessee until a retroactive assessment was made in 1949. The truth is, as shown by the record and as found by the Supreme Court of Tennessee (if it be material on this appeal, we submit that it is not), that while no steps were taken to collect the tax until 1949, the matter was under discussion on several occasions between representatives of Esso and Tennessee and no decision reached as to liability (R. 211-217, 278).

STATUTES INVOLVED.

It is true, as pointed out by appellant, that the portions of the statutes involved are set forth in the appendix to the brief for the United States in **United States of America v. James Clarence Evans, Commissioner, etc.**, Docket No. 378. With the construction of those statutes given by appellant, however, we cannot agree.

The Supreme Court of Tennessee has correctly construed the applicability of the Tennessee statutes and has found that appellant, Esso, was liable for the tax as a distributor of gasoline engaged in the business of storing gasoline, which is the privilege taxed (R. 8-10). The tax was levied against Esso under the statute since it was the first to exercise the taxable privilege of storing gasoline.

Under the express language of the Statute involved the gasoline is not taxed, the storage tanks are not taxed and the ownership of the gasoline is not taxed; it is the privilege of engaging in the business of storing gasoline, which Esso was admittedly doing, that is taxed (Code of Tennessee, Sections 1126, 1127; Brief for the United States, Docket No. 378, Appendix pp. 54-56).

SUMMARY OF ARGUMENT.

The tax involved, being a true privilege tax levied against a private corporation, Esso, which admittedly was storing the gasoline as a private contractor, does not violate any principle of implied constitutional rights.

The fact that the tax was not applicable in a factual situation entirely distinguishable does not violate the equal protection clause of the Fourteenth Amendment; nor was such question properly raised and presented so as to be ruled upon by the State Court, although appellant had ample opportunity to do so.

ARGUMENT.

Substantially the same argument as is made by appellant, Esso, here, is being made by the intervenor, appellant, United States, in its appeal, Docket No. 378. In order not to burden this Court with repetition, we, therefore, adopt in its entirety our argument as set forth in our reply brief in that appeal.

We would especially challenge to the attention of this Court the attempt made by this appellant, Esso, to confuse the clear issue by the assertion that the question of the liability of a bailee arose here only because the tax could not be collected from the owner (Brief on behalf of appellant Esso Standard Oil Company, pp. 8-9).

This assertion obviously overlooks the basic premise that the ownership of the gasoline is not taxed but that the storing is, and appellant, Esso, admittedly did the storing, was the first to do so, and so was the proper subject of the privilege tax.

In an attempt to rely upon the cases pertaining to proper classification appellant insists that it, like Tennessee Oil Company, in the case of **Tennessee Oil Company v. McCanless**, 178 Tenn. (14 Beeler) 683, is a "distributor". (Brief on Behalf of Appellant Esso Standard Oil Company, pp. 9-10.) Again the obvious fallacy is that while both may be "distributors", they were not both doing the same thing. In the **Tennessee Oil Company v. McCanless**, supra, situation the Tennessee Supreme Court found that the exempt agency and not Tennessee Oil Company was doing the storing, whereas here, appellant, Esso, as an independent contractor, was doing so (R. 9).

Tennessee Oil Company was not a bailee and was not considered as such by the Tennessee court, but on the contrary was an agent or servant of the exempt agency, a

status which appellant, Esso, does not occupy here, and for that reason appellant's argument based upon such a premise must fail (Brief on Behalf of Appellant, Esso Standard Oil Company, p. 12).

CONCLUSION.

For the reasons set forth herein and for the reasons and upon the authorities cited and considered in our reply brief in Docket No. 378, which for the sake of brevity are adopted herein by reference, appellee respectfully submits that the judgment and decree of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

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Dated February 26, 1953.